No. 17-1091

IN THE

Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

On Petition for a Writ of Certiorari to the Indiana Supreme Court

BRIEF *AMICUS CURIAE* OF CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case and in the scope of the Fourteenth Amendment's protections.

SUMMARY OF ARGUMENT

Nearly 150 years ago, in the wake of a bloody Civil War, the Fourteenth Amendment transformed the Constitution's protection of individual rights, adding to our nation's charter a sweeping new guarantee of liberty meant to secure "the civil rights and privileges of all citizens in all parts of the republic," *Report of the Joint Committee on Reconstruction, at the First Session Thirty-Ninth Congress* xxi (1866), and to keep "whatever sovereignty [a State] may have in harmony with a republican form of government and the Constitution of the country," Cong. Globe, 39th Cong., 1st Sess. 1088 (1866) (Rep. Woodbridge).

Proposed in 1866 and ratified in 1868, the Fourteenth Amendment "fundamentally altered our

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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus*'s intention to file this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

country's federal system," *McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010), in order to "repair the Nation from the damage slavery had caused," *id.* at 807 (Thomas, J., concurring in part and concurring in the judgment), and to secure for the nation the "new birth of freedom" that President Abraham Lincoln had promised at Gettysburg. Central to that task was ensuring state adherence to the full range of individual rights enshrined in America's founding documents, including the liberties enumerated in the Constitution and Bill of Rights.

The Framers wrote the Fourteenth Amendment against the backdrop of a long history of state abridgement of fundamental rights. As Rep. Jehu Baker put it, the Amendment was "a wholesome and needed check upon the great abuse of liberty which several of the States have practiced, and which they manifest too much purpose to continue." Cong. Globe, 39th Cong., 1st Sess. app. 256. The Framers were keenly aware that during slavery and in its aftermath many Southern states suppressed a host of basic freedoms. *Id.* at 2542 (Rep. Bingham) ("many instances of State injustice and oppression have already occurred in the State legislation of this Union"). Before the Civil War, "[t]he structural imperatives of the peculiar institution led slave states to violate virtually every right and freedom declared in the Bill [of Rights] . . . . Slavery bred repression." Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 160 (1998). After the war, to retain their grip over the former slaves, governments across the South enacted Black Codes designed to coerce the freedmen back into the plantation labor system and prevent them from exercising the freedoms enjoyed by whites.

The Black Codes established a range of new crimes that were enforced through the infliction of "severe

penalties," Cong. Globe, 39th Cong., 1st Sess. 474 (Sen. Trumbull), including fines, forfeiture of property, corporal punishment, imprisonment, and forced labor, all "in punishment of crimes of the slightest magnitude." *Id.* at 1123 (Rep. Cook). Members of Congress lambasted these measures, highlighting among other things the outlandish fines imposed under the Black Codes. *See id.* at 516-17, 651, 1621. Lawmakers also decried the widespread denial of property rights to the former slaves. *See id.* at 94, 475, 588. Such measures were seen as abridgements of fundamental rights, which the Fourteenth Amendment was designed to secure against state infringement. The original meaning of the Fourteenth Amendment was thus to "restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.* at 2766 (Sen. Howard).

As history shows, the Fourteenth Amendment was meant to effect a radical constitutional transformation, imposing upon the states an obligation to respect the individual liberties enumerated in the Bill of Rights. "[T]he chief congressional proponents of the Fourteenth Amendment espoused the view that the Amendment made the Bill of Rights applicable to the States," *McDonald*, 561 U.S. at 762, and their "well-circulated speeches" informed the ratifying states and the public at large that the Amendment was meant to "enforce constitutionally declared rights against the States," *id.* at 833 (Thomas, J., concurring). The Framers, moreover, entrusted the courts with responsibility for vindicating the Amendment's vital new safeguards; indeed, among the "great fundamental rights" of citizens, they believed, was the ability "to enforce rights in the courts." Cong. Globe, 39th Cong., 1st Sess. 475 (Sen. Trumbull).

In this case, however, the Indiana Supreme

Court renounced that promise and abdicated its responsibility to faithfully interpret and apply the Fourteenth Amendment. Although this Court has developed "well established" standards for identifying which protections in the Bill of Rights apply to the states through that Amendment, *McDonald*, 561 U.S. at 750, the Indiana court refused to apply those standards or to engage at all in "the sort of Fourteenth Amendment inquiry required by [this Court's] cases." *Id.* at 758 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 620 n.23 (2008)). Instead, the court below simply announced that it would "elect" not to impose on Indiana the obligations of the Eighth Amendment's Excessive Fines Clause, and in the absence of a direct command from this Court would "decline" to "subject Indiana to a *federal* test." Pet. App. 9. As shown below, that holding is entirely at odds with the text and history of the Fourteenth Amendment and this Court's precedents. *Amicus* urges the Court to grant the petition and vindicate the constitutional design of the Framers of the Fourteenth Amendment, by holding that the Amendment incorporates the Excessive Fines Clause against the states.

ARGUMENT

I. The Fourteenth Amendment Was a Response to Rampant Infringement of Fundamental Liberties by the States, Including Deprivations of Property Rights and the Use of Severe Penalties

After the Civil War, "[t]he overriding task confronting Congress and the new President was to restore the states that had attempted to secede to their proper place in the Union." David P. Currie, *The Reconstruction Congress*, 75 U. Chi. L. Rev. 383, 383 (2008). Complicating this task, the states of the ex-Confederacy remained defiant in their suppression of

former slaves and their persecution of those who had opposed secession. "Congress established the Joint Committee on Reconstruction to investigate circumstances in the Southern States and to determine whether, and on what conditions, those States should be readmitted to the Union." *McDonald*, 561 U.S. at 827 (Thomas, J., concurring). Composed of members of the House and Senate, the Committee was given both fact-finding powers and legislative jurisdiction: it took testimony and controlled the framing of constitutional amendments and legislation concerning Reconstruction. Based on its exhaustive investigation into conditions in the South, the Joint Committee submitted to Congress a report that "extensively catalogued the abuses of civil rights in the former slave States." *Id.* The report confirmed the systematic violation of fundamental rights by Southern states, demanding "changes of the organic law" to secure the "civil rights and privileges of all citizens in all parts of the republic." *Report of the Joint Committee* xxi.

Of central concern to the Joint Committee and other members of Congress were the Black Codes. Enacted in jurisdictions across the South after the war, these legislative measures represented an attempt to re-institutionalize slavery in a different guise—systematically violating the rights of the newly freed slaves to force them into conditions replicating the pre-war plantation system. Under "the barbarous codes which have been passed in all the rebel States," said one lawmaker, freedmen were in "a condition of nominal freedom worse than a condition of actual slavery." Cong. Globe, 39th Cong., 1st Sess. 1839 (Rep. Clarke); *see Report of the Joint Committee*, Pt. II at 218 ("it will be the purpose of their former masters to reduce them as near to a condition of slaves as it will be possible to do . . . . they would deprive them by severe

legislation of most of the rights of freedmen"); *id.* Pt. II at 4 (reporting testimony concerning Southern refusal "to grant to the negro his civil rights—those privileges that pertain to freedom, the protection of life, liberty, and property"). As one observer put it, "the South is determined to have slavery—the thing, if not the name." Cong. Globe, 39th Cong., 1st Sess. 94 (Sen. Sumner) (quoting report sent to Congress).

Beginning in 1865, for instance, many localities "adopted ordinances limiting black freedom of movement, prescribing severe penalties for vagrancy, and restricting blacks' right to rent or purchase real estate and engage in skilled urban jobs." Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877*, at 198 (1988); *see id.* at 200 ("Virtually all the former Confederate states enacted sweeping vagrancy and labor contract laws," which required freedmen to be contractually employed under terms supervised by the state.); Cong. Globe, 39th Cong., 1st Sess. 588 (Rep. Donnelly) ("The adult negro is compelled to enter into contract with a master, and the district judge, not the laborer, is to fix the value of the labor.").

The "centerpiece" of these Codes "was the attempt to stabilize the black work force and limit its economic options apart from plantation labor. Henceforth, the state would enforce labor agreements and plantation discipline, punish those who refused to contract, and prevent whites from competing among themselves for black workers." Foner, *supra*, at 199; *see Report of the Joint Committee*, Pt. II at 240 (reporting testimony that "[t]he planters are disposed . . . to insert in their contracts tyrannical provisions, to prevent the negroes from leaving the plantation"); *see* Cong. Globe, 39th Cong., 1st Sess. 1839 (Rep. Clarke) (citing "lately passed laws calculated to virtually make serfs of the persons that the constitutional amendment made

free").

The Black Codes also denied property rights to the ex-slave. "It seemed everywhere quite determined upon that he should not be an owner of land." *Report of the Joint Committee*, Pt. II at 243; *see, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 588 (Rep. Donnelly) ("The black code of Mississippi provides that no negro shall own or hire lands in the State."). Personal property was seized from blacks by bands of whites who acted with tacit or overt government approval. *See id.* at 94 (Sen. Sumner) (quoting report describing "the militia robbing the colored people of their property" and weapons); *id.* (quoting report describing the torture of blacks as a "means of extorting from the freed people a confession as to where they have their arms and money concealed"). "We need protection for our person and property," implored the freedmen of Tappannock, Virginia, in a letter sent to the House of Representatives in December 1865. *Id.* at 516.

Blacks who failed to comply with these mandatory contractual obligations violated the *criminal* law, and such violations, like other infractions, were punished with harsh penalties that included imprisonment, corporal punishment, fines, forfeiture of private property, and forced labor. "If employers could no longer subject blacks to corporal punishment, courts could mandate whipping as a punishment for vagrancy or petty theft. If individual whites could no longer hold blacks in involuntary servitude, courts could sentence freedmen to long prison terms, force them to labor without compensation on public works, or bind them out to white employers who would pay their fines." Foner, *supra*, at 205; Cong. Globe, 39th Cong., 1st Sess. 588 (Rep. Donnelly) ("If he thinks the compensation too small and will not work, he is a vagrant, and can be hired out for a term of service at a rate . . . to be fixed by the judge.");

id. at 93 (Sen. Sumner) ("The lash is also prescribed as a means of enforcing contracts."); *id.* at 474 (Sen. Trumbull) ("They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery."); *id.* at 1123 (Rep. Cook) (citing "laws which provide for selling these men into slavery in punishment of crimes of the slightest magnitude").

A Louisiana ordinance read to the House of Representatives was typical. Among other things, it specified that a freedman who entered town limits without special permission would be punished by "imprisonment and two days' work on the public streets, or shall pay a fine of $2.50." Blacks found on the streets after 10 p.m. without a special pass were to be "imprisoned and compelled to work five days on the public streets, or pay a fine of five dollars," and if found on the streets after 3 p.m. on a Sunday, "imprisoned and made to work two days on the public streets, or pay two dollars." Preaching the Gospel without a license was punished by "the penalty of a fine of ten dollars or twenty days' work on the public streets"; a person carrying a firearm without special permission would "forfeit his weapons, and shall be imprisoned and made to work five days on the public streets, or pay a fine of five dollars"; and engaging in commercial exchanges of merchandise without special permission was punishable "under the penalty of the forfeiture of said articles, and imprisonment and one day's labor, or a fine of one dollar." Anyone who rented a house to blacks would "pay a fine of ten dollars for each offense." Cong. Globe, 39th Cong., 1st Sess. 516-17 (Rep. Elliot).

These measures were characteristic of those that swept the South. *See, e.g., id.* at 1621 (Rep. Myers) (Alabama's laws, "among other harsh inflictions[,]

impose an imprisonment of three months and a fine of $100 upon any one owning fire-arms, and a fine of fifty dollars and six months' imprisonment on a servant or laborer (white or black) who loiters away his time or is stubborn or refractory"); *id.* ("a vagrant in [Florida] shall be punished by a fine not exceeding $500 and imprisoned for a term not exceeding twelve months, or by being sold for a term not exceeding twelve months, at the discretion of the court"); *id.* at 651 (Rep. Grinnell) (reporting that "[a] white man in Kentucky may keep a gun," but "if a black man buys a gun he forfeits it and pays a fine of five dollars").

Formal distinctions between the liability of whites and blacks to fines and other punishments were, of course, supplemented by discriminatory application of the written law. A letter was read in the Senate, for instance, reporting that "in nine cases out of ten . . . where a white man has provoked an affray with a black, and savagely misused him, the black man has been fined for insolent language because he did not receive the chastisement in submissive silence, while the white man has gone free." Cong. Globe, 39th Cong., 1st Sess. 94 (Sen. Sumner).

As these examples illustrate, fines were used interchangeably and in combination with imprisonment and physical punishments to enforce the regime of the Black Codes. Accounts of these oppressive measures reached Congress in steady reports from the South. *See id.* at 1838 (Rep. Clarke) ("Every mail brings to us the records of injustice and outrage."). Lawmakers viewed these measures as violating core freedoms identified in the Bill of Rights, *see id.* at 1617 (Rep. Moulton) ("The constant and barbarous outrages committed by rebels in the South against the Union men and freedmen would fill volumes . . . . There is neither freedom of speech, of the press, or protection to life,

liberty, or property."), and they condemned these laws as abridgements of freedmen's fundamental liberties. "A law that does not allow a colored person to hold property . . . is certainly a law in violation of the rights of a freeman." *Id.* at 475 (Sen. Trumbull).

Congress first responded through legislation, enacting the Civil Rights Act of 1866 and later an expansion of the Freedmen's Bureau—both of which sought to safeguard property rights. *See* Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27, 27 ("citizens, of every race and color . . . shall have the same right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens"); Act of July 16, 1866, ch. 200, § 14, 14 Stat. 173, 176-77 ("the right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property, and to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, . . . shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color, or previous condition of slavery").

Proponents of these bills explicitly linked the freedoms denied to blacks in the South with the fundamental guarantees enshrined in America's founding documents. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 632 (Rep. Moulton) ("[T]he civil rights referred to in the bill are . . . the great fundamental rights that are secured by the Constitution of the United States, and that are defined in the Declaration of Independence, the right to personal liberty, the right to hold and enjoy property, to transmit property, and to make contracts. These are the great civil rights that belong to us all, and are sought to be protected by this bill."); *id.*

at 475 (Sen. Trumbull) (describing "[t]he great fundamental rights set forth in this bill" as including "the right to acquire property . . . to make contracts, and to inherit and dispose of property").

Congress's statutory responses to the Black Codes also took aim at excessive and discriminatory penalties. *See* Act of July 16, 1866, 14 Stat. at 177 ("no penalty or punishment for any violation of law shall be imposed or permitted because of race or color, or previous condition of slavery, other or greater than the penalty or punishment to which white persons may be liable by law for the like offence"); Act of Apr. 9, 1866, 14 Stat. at 27 ("citizens, of every race and color . . . shall have the same right . . . to full and equal benefit of all laws and proceedings . . . as is enjoyed by white citizens, and shall be subject to like punishment, pains. and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding"); *id.* (making it a crime to "subject, under color of any law . . . any inhabitant of any State or Territory . . . to different punishments, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude . . . or by reason of his color or race, than is prescribed for the punishment of white persons").

Ultimately, however, Congress "deemed these legislative remedies insufficient. Southern resistance, Presidential vetoes, and this Court's pre-Civil-War precedent persuaded Congress that a constitutional amendment was necessary to provide full protection for the rights of blacks." *McDonald*, 561 U.S. at 775. As one Senator explained, the newly freed slaves needed to be guaranteed the "essential safeguards of the Constitution." Cong. Globe, 39th Cong., 1st Sess. 1183 (Sen. Pomeroy).

II. The Fourteenth Amendment Transformed the Nation's Federal System To Prevent States from Violating the Freedoms Set Forth in the Bill of Rights

In order "to provide a constitutional basis" for the protection of fundamental rights in the South, *McDonald*, 561 U.S. at 775, the American people transformed our federal system by adopting the Fourteenth Amendment. The debates in Congress over the Amendment confirm that its first section was understood—and described to the ratifying public—as securing against state encroachment the fundamental liberties enumerated in the Constitution and the Bill of Rights.

In the House and Senate, "the chief congressional proponents of the Fourteenth Amendment espoused the view that the Amendment made the Bill of Rights applicable to the States," *id.* at 762, overturning the holding of *Barron v. Baltimore*, 32 U.S. 243 (1833), that only the federal government was bound by the Bill of Rights. *See Adamson v. California*, 332 U.S. 46, 72 (1947) (Black, J., dissenting) ("With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced.").

Section One of the Fourteenth Amendment was the brainchild of Ohio congressman John Bingham, who served on the Joint Committee on Reconstruction. Introducing his draft of the Amendment in February 1866, "Bingham began by discussing *Barron* and its holding that the Bill of Rights did not apply to the States. He then argued that a constitutional amendment was necessary to provide 'an express grant of power in Congress to enforce by penal enactment these great canons of the supreme law, securing to all the

citizens in every State all the privileges and immunities of citizens, and to all the people all the sacred rights of person.'" *McDonald*, 561 U.S. at 829 (Thomas, J., concurring) (quoting Cong. Globe, 39th Cong., 1st Sess. 1089-90). "Bingham emphasized that § 1 was designed 'to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today.'" *Id.* (quoting Cong. Globe, 39th Cong., 1st Sess. 1088). This speech was "broadly distributed" in pamphlet form, bearing the subtitle "In Support of the Proposed Amendment to Enforce the Bill of Rights," and the speech received widespread newspaper coverage as well. *Id.* at 829-30 (Thomas, J., concurring).

The next month, Bingham "delivered a second well-publicized speech, again arguing that a constitutional amendment was required to give Congress the power to enforce the Bill of Rights against the States." *Id.* at 829 (Thomas, J., concurring). This speech was also "extensively published." Cong. Globe, 39th Cong., 1st Sess. 1837 (Rep. Lawrence).

In April, the Joint Committee unveiled a revised draft of the Amendment, which contained in its present form the sweeping guarantee of fundamental rights and liberties set forth in the Amendment's first section:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1; *see* Cong. Globe, 39th

Cong., 1st Sess. 2764. "Senator Jacob Howard, who spoke on behalf of the Joint Committee on Reconstruction and sponsored the Amendment in the Senate, stated that the Amendment protected all of 'the personal rights guarantied and secured by the first eight amendments of the Constitution.'" *McDonald*, 561 U.S. at 762 n.9 (quoting Cong. Globe, 39th Cong., 1st Sess. 2765). "Howard explained that the Constitution recognized 'a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, . . . some by the first eight amendments of the Constitution,' and that 'there is no power given in the Constitution to enforce and to carry out any of these guarantees' against the States." *Id.* at 831-32 (Thomas, J., concurring) (quoting Cong. Globe, 39th Cong., 1st Sess. 2765). "Howard then stated that 'the great object' of § 1 was to 'restrain the power of the States and compel them at all times to respect these great fundamental guarantees.'" *Id.* at 832 (Thomas, J., concurring) (quoting Cong. Globe, 39th Cong., 1st Sess. 2766). "News of Howard's speech was carried in major newspapers across the country[.]" *Id.* at 832-33 (Thomas, J., concurring).

"Finally, Representative Thaddeus Stevens, the political leader of the House and acting chairman of the Joint Committee on Reconstruction," also made explicit the import of the Amendment, stating "during the debates . . . that 'the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States.'" *Id.* at 762 n.9 (quoting Cong. Globe, 39th Cong., 1st Sess. 2459).

"As a whole, these well-circulated speeches indicate that § 1 was understood to enforce constitutionally declared rights against the States[.]" *Id.* at 833

(Thomas, J., concurring). "[N]ot a single person in either house spoke up to deny these men's interpretation of section I." Amar, *The Bill of Rights*, at 187; *see* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. Rev. 863, 934 (1986) ("The amendment's author, House and Senate floor leaders, and a number of proponents and opponents expressed the belief that it secured Bill of Rights guarantees. Not one senator or congressman denied that the amendment's framers and supporters intended to secure the Bill of Rights, or expressed an intention to exclude Bill of Rights guarantees from the rights Congress sought to secure.").

The Amendment's fate was not settled by Congress, of course, but by the states, where it was sent for ratification after both Houses approved it in June 1866. Ratification of the Fourteenth Amendment was the key political issue of the day. In the congressional elections of 1866, the Amendment was the main plank of the Republican platform, while "opposition to the Amendment [was] the focus of the Democratic platform," Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866*, 101 Geo. L.J. 1275, 1279 (2013); *id.* (President Johnson's "sustained attempt to defeat the Amendment . . . helped shape public understanding of the proposed text and its impact on the autonomy of the states"). "More than anything else, the election became a referendum on the Fourteenth Amendment. Seldom, declared the *New York Times*, had a political contest been conducted 'with so exclusive reference to a single issue.'" Foner, *supra*, at 267 (quoting *N.Y. Times*, Oct. 11, 1866).

The 1866 elections resulted in a landslide victory for the Fourteenth Amendment's supporters in the Republican Party. *Id.* These decisive results turned the

tide in favor of ratification, which was finally achieved in July 1868. During the intervening months, the Amendment's proponents "continued to stress the need to protect the enumerated constitutional rights of American citizens against abridgment by the states," and that "'[t]his protection must be coextensive with the whole Bill of Rights.'" Lash, *supra*, at 1325 (quoting *N.Y. Times*, Nov. 15, 1866). As more and more states voted on ratification, "the idea that the amendment would bind the states to enforce personal liberties enumerated in the Bill of Rights was no longer (if it ever was) a disputed proposition. No one argued the point. The debate involved *whether* this was a good idea." *Id.* at 1326; *see* Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 147 (1986) (the records of the ratifying legislatures are sparse but "fully consistent with an intent to apply the Bill of Rights to the states").

In sum, "critical aspects of the Nation's history . . . underscored the need for, and wide agreement upon, federal enforcement of constitutionally enumerated rights against the States." *McDonald*, 561 U.S. at 840-41 (Thomas, J., concurring). To achieve that end, the Fourteenth Amendment was adopted to effect a radical constitutional transformation—one that would impose upon the states an obligation to respect certain fundamental rights, and in particular those individual liberties enumerated in the federal Bill of Rights.

III. The Indiana Supreme Court Abdicated Its Responsibility To Enforce the Protections Guaranteed by the Fourteenth Amendment

Consistent with the text and history of the Fourteenth Amendment, it has long been established that courts must ensure that challenged state action is consistent with the Amendment's guarantees. "[T]he right of a State to regulate the conduct of its citizens is

undoubtedly a very broad and extensive one, and not to be lightly restricted. But there are certain fundamental rights which this right of regulation cannot infringe." *The Slaughter-House Cases*, 83 U.S. 36, 114 (1872) (Bradley, J., dissenting). Indeed, the Framers of the Fourteenth Amendment viewed the "right to enforce rights in the courts" as one of the "great fundamental rights" possessed by all citizens. Cong. Globe, 39th Cong., 1st Sess. 475 (Sen. Trumbull). The Fourteenth Amendment's promise of liberty would be an empty one if courts could simply abandon their responsibilities and give states free rein to abrogate the liberty and property rights set forth in the Constitution and the Bill of Rights.

That is what the Indiana Supreme Court did here. Instead of applying the "well established" standards prescribed by this Court for identifying which of the protections in the Bill of Rights apply to the states through the Fourteenth Amendment, *McDonald*, 561 U.S. at 750, the court refused to analyze the matter at all—simply announcing that it would "elect" not to impose on Indiana the obligations of the Eighth Amendment's Excessive Fines Clause. Pet. App. 9. That decision cannot be squared with the text and history of the Fourteenth Amendment or this Court's precedents.

This Court has already "held that most of the provisions of the Bill of Rights apply with full force to both the Federal Government and the States." *McDonald*, 561 U.S. at 750. While this Court has not taken the position that the Fourteenth Amendment categorically applies the entire Bill of Rights to the states, it has adopted "a process of 'selective incorporation'" under which the Amendment's Due Process Clause has been found to "fully incorporate[] particular rights contained in the first eight Amendments." *Id.* at 763; *cf.*

Akhil Reed Amar, *America's Constitution: A Biography* 389 (2005) ("[S]keptics have raised important questions about the peculiar manner in which the Court eventually came to apply the Bill of Rights to the states .... But none of the skeptics' objections is a good argument against incorporation per se, as distinct from the particular manner in which the Court has effected and explained its doctrine."). Indeed, the Court long ago "shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause," and only a "handful" of such rights have not received a definitive ruling from this Court. *McDonald*, 561 U.S. at 764-65; *see id.* at 765 n.13 ("We never have decided whether ... the Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause." (citing *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22 (1989))).

While this Court has not resolved the incorporation status of the Excessive Fines Clause, it has developed a "standard that is well established in our case law" for deciding whether any particular protection guaranteed by the Bill of Rights applies to the states through the Fourteenth Amendment. *Id.* at 750. "In answering that question," this Court has said, courts "must decide whether the right ... is fundamental to our scheme of ordered liberty, or ... deeply rooted in this Nation's history and tradition." *Id.* at 767 (emphasis omitted) (citations omitted).

When faced with Petitioner Timbs's constitutional challenge to his state's forfeiture laws, however, the Indiana Supreme Court flatly refused to conduct "the sort of Fourteenth Amendment inquiry required by [this Court's] cases." *McDonald*, 561 U.S. at 758 (quoting *Heller*, 554 U.S. at 620 n.23). Instead, after

observing that this Court has not "decide[d] the issue authoritatively," the court declared that "Indiana is a sovereign state within our federal system, and we elect not to impose federal obligations on the State that the federal government itself has not mandated." Pet. App. 8-9. In support of this pronouncement, the court explained that "we decline to subject Indiana to a *federal* test that may operate to impede development of our own excessive-fines jurisprudence under the Indiana Constitution." *Id.* at 9.

This reasoning is indefensible. "Our federal system 'charges state courts with a coordinate responsibility' to give effect to all Americans' federally protected rights." Pet. 26 (quoting *Howlett v. Rose*, 496 U.S. 356, 367 (1990)); *see also* Proclamation No. 13, 15 Stat. 708, 710 (July 28, 1868) ("the legislature of Indiana ratified [the Fourteenth Amendment] January 29th, 1867"). It is irrelevant that adherence to the guarantees contained in our national charter may limit the range of state action; indeed, that is the very point of those federal guarantees. As this Court has explained: "Incorporation always restricts experimentation and local variations," but that is simply because "'[t]he enshrinement of constitutional rights necessarily takes certain policy choices off the table.'" *McDonald*, 561 U.S. at 790 (quoting *Heller*, 554 U.S. at 636).

Treating the protection against excessive fines as a second-class right is particularly inexcusable given the history, recounted above, of the use of fines to subordinate African Americans and force them to work for their former masters. The Indiana Supreme Court's interpretation of the Fourteenth Amendment would allow states to impose any fines they wish, no matter how excessive and out of line with fundamental principles of justice and fair play. That cannot be right.

What the court below should have done is ask, as this Court's cases require, whether the right to be free of excessive fines "is fundamental to our scheme of ordered liberty" or "deeply rooted in this Nation's history and tradition." *Id.* at 767 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968), and *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)) (emphasis omitted). To answer those questions, this Court has looked to ancient legal codes, the 1689 English Bill of Rights, the common law and its prominent expounders such as Blackstone, the views of the American colonists in the Revolutionary era, early American state constitutions, records of the drafting and ratifying of the Constitution and Bill of Rights, and evidence surrounding the adoption of the Fourteenth Amendment. *See id.* at 767-78. By these metrics, as the Petition demonstrates, freedom from excessive fines is "among those fundamental rights that are essential to our system of ordered liberty," Pet. 25, a vital protection against "the potential for governmental abuse of its prosecutorial power," *Browning-Ferris Indus.*, 492 U.S. at 266 (quotation marks omitted). Such freedom is therefore one of the "fundamental guarantees" that it was "the great object" of the Fourteenth Amendment to secure against state encroachment. Cong. Globe, 39th Cong., 1st Sess. 2766 (Sen. Howard).

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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